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No. 88-127

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1988

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,
v.

ROBERT T. GOODE, JR.,
Respondent.

**BRIEF ON THE MERITS OF RESPONDENT
ROBERT T. GOODE, JR.
ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF VIRGINIA**

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QUESTIONS PRESENTED

I. Whether a railroad worker who was injured while repairing railroad equipment used for braking and stopping hopper cars and who does not perform traditional longshoring activities, is a "maritime employee" under the Longshore and Harbor Workers' Compensation Act?

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Respondent, Robert T. Goode, Jr., respectfully prays
that this Court affirm the Judgment of the Supreme Court
of Virginia.

STATEMENT OF THE CASE
Procedural Summary

Robert T. Good, Jr., filed suit under the Federal
Employers' Liability Act, 45 U.S.C. § 51, *et seq.*, against
the Norfolk & Western Railway Company ("Railroad") in
the Circuit Court for the City of Norfolk, Virginia for

injuries sustained on February 11, 1985, while performing maintenance on a retarder at the Railroad's Lambert's Point Yard in Norfolk, Virginia. The injury resulted in the loss of an index finger and permanent damage to another finger as well as to the hand. Goode was unable to work in his occupation as a machinist from the date of the accident to August 1, 1985.

The Railroad moved to dismiss the suit contending that Goode was covered by the Longshore Harbor Workers' Compensation Act ("LHWCA") and thus the LHWCA was the exclusive remedy for his injuries. On November 13, 1986, Judge Charles R. Waters, II, of the Circuit Court of the City of Norfolk issued a letter opinion dismissing the suit holding that the LHWCA provided Goode's exclusive remedy. J.A. 34-39. An Order to this effect was entered by the Court on December 17, 1986. J.A. 43.

The Supreme Court of Virginia granted an appeal to Goode and on April 22, 1988, issued a decree reversing the decision of the Circuit Court and remanding the case for a trial on the FELA claim. J.A. 46. The Supreme Court of Virginia did not render an opinion in this action but simply cited in the decree its opinion in *Schwalb v. Chesapeake & Ohio Railway Co.*, 235 Va. 27, 365 S.E.2d 742 (1988), decided on March 4, 1988.

This Court granted the Railroad a Writ of Certiorari to the Supreme Court of Virginia.

Factual Summary

Robert T. Goode, Jr. is employed as a machinist in the Motive Power Department of the Railroad. Machinists are

assigned jobs based solely on seniority by hiring date. They may be assigned to work in a geographic area that ranges from Norfolk, Virginia to Crewe, Virginia, approximately 125 miles from Norfolk. J.A. 191, 195.

One of the sites where a machinist may be assigned to work in Norfolk is the Lambert's Point Yard. The Lambert's Point Yard is a terminal where coal mined in Virginia, West Virginia and Kentucky is brought by train for transfer to ships. The loaded hopper cars travel from the coal fields to the Lambert's Point Yard where they are unloaded by the dumpers and then return empty to the mines in a continuous cycle. J.A. 35, 192, 196.

Goode worked at the Lambert's Point Yard. At the Lambert's Point Yard, a machinist may be assigned to work at the 38th Street Car Shops, the Motive Power Building or the Round House. J.A. 191, 195.

At the Lambert's Point Yard a machinist can be assigned a number of tasks, including the repair of railroad cars, rerailling derailed railroad cars, repairing and maintaining pushers (small electronic locomotives) and the Barney (a devise that pushes railroad cars up an incline), and repairing and maintaining the dumpers. J.A. 156, 191, 195.

On February 11, 1985, Goode was assigned the duty of performing maintenance on an air cylinder on a retarder which is located on the south side dumper at the Lambert's Point Yard. While performing the maintenance, Goode was injured.

A retarder is a device used to stop or slow the movement of railroad cars. Retarders are used throughout the

Railroad's system and are common to all railroads and their use is not limited to loading or unloading ships. J.A. 191, 195. Dumpers are found at other railroad hopper car unloading facilities which have no connection with loading ships. J.A. 152. The south side dumper is one end point of a continuous cycle of railroad cars which begins at the coal mines. J.A. 35, 192, 196.

Once a railroad car entering the dumper is stopped, it is seized by mechanical arms, turned upside down and the coal is dumped from the car to a conveyor belt. After the coal has been dumped out of the car, the car moves by gravity to a "kick-back" incline, then by gravity it is free-rolled to an empty return yard for its trip back to the coal fields. J.A. 35.

After the coal is dumped from the railroad cars, it is carried by a conveyor belt system, known as Belt B, from the south side dumper to the Belt Change House. In the Belt Change House the coal is transferred to another conveyor belt system, consisting of Belts C, D, and E, that carries the coal to large chutes on the pier for loading onto ships. J.A. 165, 192, 196. The C belt may be reversed and the coal transferred through a chute into railroad hopper cars located on the track outside the Belt Change House rather than forward to D Belt. J.A. 166, 167. The coal can be diverted from the piers. J.A. 149.

As a railroad machinist, Goode is eligible for retirement benefits under the Federal Railroad Retirement System and to receive Railroad Retirement Board Unemployment Benefits when furloughed or dismissed

due to illness or a disabling non-work related injury. The employment contract under which Goode works is negotiated under the Federal Railway Labor Act and his right to a hearing and to appeal any disciplinary action imposed by the Railroad is mandated by that Act. J.A. 192, 196.

SUMMARY OF ARGUMENT

The decision of the Supreme Court of Virginia that Robert T. Goode, Jr. is not a maritime employee under the Longshore and Harbor Workers' Compensation Act is consistent with the decisions of this Court. At the time he was hurt, Goode was performing traditional railroad work. He was repairing a railroad retarder system the purpose of which is to stop and hold railroad cars. He was not performing longshoring tasks when he was repairing the retarder and was not a "maritime employee" under the LHWCA. See *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977). A review of the Legislative history and amendments to the Longshore and Harbor Workers' Compensation Act since its enactment in 1927 indicate that the intent of Congress was to extend coverage under the Act to workers who were otherwise not provided a remedy. That is not the case before the Court. Robert T. Goode, Jr., as a railroad worker, has a remedy for the injury he suffered on the job; the Federal Employers' Liability Act. The argument put forward by the Railroad does not implement the Congressional

intent, it merely substitutes a federally enacted compensation scheme with a strictly controlled measure of compensation.

ARGUMENT

I. CONGRESS DID NOT INTEND TO SHIFT COVERAGE FOR INJURED RAILROAD WORKERS FROM THE FELA TO THE LHWCA BY THE 1972 AMENDMENTS TO THE LHWCA.

In 1972 Congress was faced with the problem that many states had inadequate workers' compensation statutes. Longshoremen and ship repairmen injured over navigable waters could expect to have significantly better compensation than workers who were doing the same type of work but were not over the water. The nature of longshoring and ship repair work placed these workers in a situation where they might move in and out of LHWCA coverage numerous times during any particular day depending on which side of the gang plank they were on at any particular time. *U.S. Senate Committee on Labor and Public Welfare, 92nd Cong., Senate Bill 2318 pp. 74-75.*

Congress amended the LHWCA to address this problem by extending the Act's coverage beyond its traditional coverage over navigable waters to include other categories of maritime employees. Since the 1972 amendments, a worker's eligibility for compensation depends not only where that worker was injured, but also on

whether the worker was engaged in "maritime employment." These are known as the status and situs tests.¹

As a railroad worker Goode is covered by the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* (hereinafter "FELA"). The FELA has been the equivalent of a compensation statute for railroad workers since 1908.

The FELA has been consistently viewed as remedial in nature. *Hoepfner v. Northern Pacific Railway Company*, 61 F. Supp. 819 (D. C. Mont. 1945). The FELA has worked well, has not been under attack for any inadequacy by the

¹ The 1972 Amendments to the LHWCA enumerated this two-pronged test. Section 903(a) of the Act sets forth the "situs" test as to where a longshoreman's claim must occur. It states:

Except as otherwise provided in this section, compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. § 903(a).

Section 902 of the Act defines the "status" test, that is, the status an employee must occupy before the LHWCA applies. It states:

The term 'employee' means any person engaged in maritime employment, including any longshoreman or any other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder and shipbreaker

33 U.S.C. § 902(3).

workers protected by the FELA or by their employers, the railroads. Even though the FELA is a "jury trial" system rather than a "no fault" compensation system, workers have received adequate compensation for on-duty injuries. When the LHWCA was amended the focus was on inadequate state laws and compensation systems, and not on the alternative federal system as embodied in the FELA.

The purpose of the 1972 amendments was to correct the checkered coverage that certain maritime employees had faced. The legislative history is replete with discussion and analysis focusing on the needs of the stevedores and the ship builders. It is noteworthy that the U. S. Senate hearings on Senate Bill number 2318 (1972 Longshoremen's Harbor Workers' Compensation Acts amendments) are singularly silent with respect to railroad workers. The reason for this silence is not hard to understand. At the time the amendments were being considered, there was no inadequacy in or controversy with respect to the compensation system for railroad workers, the FELA. The entire focus of the legislation was on the inadequacies and inconsistencies of the existing state laws, as well as the need to improve the LHWCA's benefits and protection. The Railroad is now trying to use these amendments to expand the coverage to include railroad workers such as Robert Goode, a prospect that the Congress never intended to include. When Congress amended the Longshore and Harbor Workers' Compensation Act in 1972 and again in 1984, the legislative history indicates that there was no intention to effect the rights of railroad workers such as Robert Goode.

During the several years of consideration by Congress leading to the 1972 amendments to the LHWCA, there were a number of hearings and numerous witnesses attesting to the problems with existing state laws and the need to improve the LHWCA. A review of the Senate and House Hearings, as well as the Committee Reports and Debates shows no testimony or questions by either railroad employers, employees or their collective bargaining agents on the desirability of bringing such workers under the Longshore and Harbor Workers' Compensation Act instead of the FELA protections. *See 1972 Longshoremen's Act Amendments, U. S. Senate Hearings on Senate Bill 2318.*

While the absence of involvement by effected parties generally does not preclude Congress from acting, the situation with respect to workers' compensation programs may be somewhat different. Historically, all workers' compensation programs represent a legislative bargain between employers and their employees whereby the employee gives up certain rights against the employer in return for certainty of medical treatment and benefits, while the employer gives up certain defenses it may have against the employee in connection with the claim. This is the essence of the "no fault" compensation system. It is inconceivable that sophisticated and politically active employers, such as the railroads and their equally sophisticated and active employee representatives would not have been involved in the legislative process if Congress had intended to effect their rights. Their total absence from the scene must be given weight with regard to the Congressional intent. That Congress was aware of the different compensation systems effecting employees is seen by the way in which a proposal to shift

protection of certain employees from the Jones Act, 40 U.S.C. § 688 *et seq.*, to the LHWCA was treated during the consideration of the 1972 amendments. A proposal to extend coverage of the LHWCA to workers engaged in off shore oil drilling was examined in detail with extensive testimony from effected employers, unions, trial lawyers and others. 1972 *Longshoremen's Act Amendments*, U. S. Senate Hearings on Senate Bill 2318, pp. 574, 591, 351, 393. Congress decided to take no action on this proposal. U. S. Senate Committee on Labor and Public Welfare, 92nd Cong., Senate Bill 2318, pp. 537-538.

There are two significant points regarding this off shore drilling issue. First, when Congress contemplated changing the relationship of parties concerning compensation, those parties were brought into the discussions. Second, the Jones Act is a compensation system based on the FELA, in fact, it incorporates FELA provisions. See 46 U.S.C. § 688, *et seq.* Congressional intent not to change the Jones Act suggests that as a compensation system, the FELA approach was not considered inadequate by the Congress, thereby lending even more support to the view that erosion of FELA protection was not contemplated.²

² It should also be noted that Congress was not unaware of the FELA interplay with the LHWCA, and the District of Columbia compensation statute specifically excludes railroad workers from its coverage. 36 D.C. Code § 501(2), *et seq.* That statute, an appendage to the LHWCA, operated from 1927 until 1982 as the Worker Compensation Statute for private employees in the District of Columbia. To suggest that Congress intended to exclude railroad workers from FELA coverage everywhere except in the District of Columbia by virtue of the 1972 amendments creates an unrealistic legislative inconsistency.

Virtually every major decision of this Court since 1972 concerning the LHWCA has required an analysis of the legislative intent. See *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985), *P.C. Pfeiffer v. Ford*, 444 U.S. 69 (1979), *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977). In the most recent case of *Herb's Welding, Inc. v. Gray*, this Court, in discussing the coverage of certain offshore drilling employees, referred to the legislative history and stated:

... the absence of any mention of drilling platforms in the discussion of the LHWCA, combine to suggest that the 1972 Congress at least did not intentionally extend the LHWCA to workers such as Gray. . . .

470 U.S. at 420.³

Regardless of the impact of Congress' actions on longshoremen engaged in loading and unloading activities, there is nothing in the legislative history to suggest that Congress intended to effect the injury compensation program of workers engaged in traditional railroading activities, who are identified as railroad workers.

³ Following the Supreme Court decision in *Herb's Welding, Inc. v. Gray*, which clearly intends to stop the reckless extension of coverage of the LHWCA, one Federal District Court has similarly limited the coverage of the LHWCA. In *West v. Chevron, U.S.A., Inc.*, 615 F. Supp. 377 (D.C. La. 1985), the United States District Court for the District of Louisiana citing *Herb's Welding*, stated, " 'Its purpose was to cover those workers on the situs who are involved in the essential elements of loading and unloading'. . . . This Court heeds the signal of the Supreme Court, and believes it is a healthy sign." 615 F. Supp. at 381. Robert Goode urges this Court to also "heed the signal" and not lump an employee from the traditional railroad craft of machinist into the craft of Longshoremen.

A careful examination of both the FELA and LHWCA reveals that there was no revocation of power previously granted by Congress under the FELA, nor expansion to cover workers like Goode under the LHWCA. In fact, in the legislative history of the 1972 Amendments to the LHWCA, it was stated:

The committee does not intend to cover employees by the LHWCA who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activities.

See *U.S. Code Congressional Admin. News*, 92nd Congress, 2nd Session, Volume 3, Page 4699 at Page 4707.

This Congressional intent to not expand coverage to workers such as Goode, is also supported by an explanation of the amendment in "Coverage under the Longshoremen's and Harbor Workers' Compensation Act," which was printed in the *Federal Register* on May 23, 1974:

In amending the Longshoremen's and Harbor Workers' Compensation Act, Congress did not exclude any employees or others previously covered nor did it delineate any new or different kinds of work for which compensation might be paid. The amended provisions specifically refer to those in traditional types of work done by longshoremen and harbor workers and other employees engaged in maritime employment.

Volume 39, Federal Register, 101, Section 710.

Because the Congress never intended to extend LHWCA coverage to a railroad worker such as Goode, the judgment of the Supreme Court of Virginia should be affirmed.

II. A RAILROAD WORKER MAINTAINING RAILROAD EQUIPMENT AND NOT PERFORMING TRADITIONAL LONGSHORING IS NOT A "MARITIME EMPLOYEE" UNDER THE LHWCA.

As discussed above, when enacting the 1972 amendments to the LHWCA, Congress intended to exclude from coverage persons who do not perform traditional types of work done by longshoremen and harbor workers. The Virginia Supreme Court, relying upon its decision in *Schwalb v. Chesapeake & Ohio Rwy. Co.*, 235 Va. 27, 365 S.E.2d 742 (1988), and by implication its decision in *White v. Norfolk & Western Rwy. Co.*, 217 Va. 823, 232 S.E.2d 852, cert. denied, 434 U.S. 860 (1977), functionally concluded that the plaintiff, Robert Goode, was not performing a traditional longshoring task and thus, was not an employee under the LHWCA. This determination is consistent with judicial interpretations of LHWCA coverage since the 1972 amendments were adopted.

In *Herb's Welding Inc. v. Gray*, 470 U.S. 414 (1985), this Court was presented with the question of whether a welder working on a fixed offshore oil-drilling platform was covered by the LHWCA. The Court of Appeals for the Fifth Circuit held that Gray's work as a welder had "a realistically significant relationship to traditional maritime activity involving navigation and commerce on navigable waters" and therefore extended coverage of the LHWCA to him. 470 U.S. at 418-19. This Court concluded that the Fifth Circuit had taken too expansive a reading of maritime employment. 470 U.S. at 421. Concluding that Gray was not covered by the LHWCA, this Court

stated the following concerning the 1972 Amendments to the LHWCA:

The expansion of the definition of navigable waters to include rather large shoreside areas necessitated an affirmative description of the particular employees working in those areas who would be covered. This was the function of the maritime employment requirement. But Congress did not seek to cover all those who breathe salt air. *Its purpose was to cover those workers on the situs who are involved in the essential elements of loading and unloading*; it is "clear that persons who are on the situs but not engaged in the overall process of loading or unloading vessels are not covered." *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. at 267. While "maritime employment" is not limited to the occupations specifically mentioned in Sec. 2(3), neither can it be read to eliminate any requirement of a connection with the loading or construction of ships. As we have said, the "maritime employment" requirement is "an occupational test that focuses on loading and unloading." *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 80 (1979). The amendments were not meant "to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they were injured in an area adjoining navigable waters used for such activity." HR. Rep. NO. 92-1441, p. 11 (1972); S. Rep. NO. 92-1125, p. 13 (1972). We have never read "maritime employment" to extend so far beyond those actually involved in moving cargo between ship and land transportation [footnotes omitted, emphasis added].

470 U.S. at 423-24.

Similarly, in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977), this Court extended LHWCA coverage to a checker and a terminal laborer who were performing traditional longshoring functions in connection

with the movement of cargo from a ship to land transportation. In discussing the status test, this Court stated:

[The intent is] to cover those workers involved in the essential elements of unloading and loading a vessel – taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area. . . . [P]ersons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. Thus, employees such as truck drivers, whose responsibility on the waterfront is to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered [emphasis added].

249 U.S. at 266-67. See also *Northeast Marine Terminal Co. v. Caputo*, 249 U.S. at 266 n.27.

The *Caputo* decision makes it clear that unless the activities of an employee are closely related to the actual loading or unloading of a vessel, the employee is not covered by the LHWCA, and an employee involved in land transportation is covered by the LHWCA.

The nature of the work being performed by the employee was also emphasized by this Court in *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979), when it extended LHWCA coverage to a warehouseman who was injured while fastening military equipment to railroad flat cars and to a cotton handler who was injured while unloading a bale of cotton from a dray wagon into a pier warehouse. This Court emphasized that the plaintiffs were "engaged in the types of duties that longshoremen perform in transferring goods between ship and land transportation." 444 U.S. at 81. Performing traditional longshoring work is critical to coverage under the LHWCA. In addition, this Court reemphasized that employees involved in

land transportation are not covered by the LHWCA. 444 U.S. at 83.

Other Courts have also recognized that there are limits to coverage under the LHWCA. See, e.g., *Conti v. Norfolk & Western Railway Co.*, 566 F.2d 890 (4th Cir. 1977); *Dravo Corp. v. Banks*, 567 F.2d 593 (3rd Cir. 1977); *West v. Chevron U.S.A., Inc.*, 615 F. Supp. 377 (D.C. La. 1985); *Gatthers v. C & O Railway Co.*, Law No. 4290-G (Circuit Court of the City of Newport News, Virginia 1979); *Evans v. Norfolk & Western Railway Co.*, Law No. L84-112 (Circuit Court of the City of Norfolk, Virginia 1985).

In *Dravo Corp. v. Banks*, 567 F.2d 593 (3rd Cir. 1977), the Third Circuit held that a laborer at a shipyard whose duties had no traditional maritime characteristics but were rather typical of support services performed in any production entity, whether maritime or not, was not a covered worker under the LHWCA. 567 F.2d at 594. In *Dravo* the employees' duties included cleaning up debris around the employers' shipbuilding plant, which was considered by the employer as part of its plant maintenance program. The Third Circuit examined duties to determine the employees' status and noted that he was not directly involved in a necessary ingredient to the entire process of vessel construction but rather determined that the clearing of ice (the act Banks was engaged in when injured) was a necessary ingredient to any plant operation whether maritime or not. In making this determination that Banks was not a maritime employee, the Court in *Dravo* found that in order for an employee to be covered under the LHWCA it must be determined that the employee is an "integral part" of either the shipbuilding or unloading process. 567 F.2d at 595.

In *Conti v. Norfolk & Western Railway Co.*, 566 F.2d 890 (4th Cir. 1977), the Fourth Circuit determined that the LHWCA should *not* be extended to two brakemen and a conductor-brakeman who are employed by the Railroad at the Lambert's Point Terminal. Each of the employees had been injured while moving railroad cars through the unloading process. In concluding that the workers were not covered by the LHWCA the Fourth Circuit stated:

It is clear that in the cases before us the occupation of the plaintiffs were not of a traditionally maritime nature, but on the contrary were those traditionally associated with railroading. Their tasks and responsibilities with respect to the unloading of the coal from the hopper cars would have been the same at an inland terminal as they were at Lambert's Point, and the sophisticated automation of the facilities at the latter terminal should not obscure the basic fact that the plaintiffs were engaged in unloading a coal train, not loading a vessel. We find nothing in the amendments or the legislative history [to the LHWCA] to indicate that under the circumstances the Congress intended to transfer the redress of such injured railroad workers from the FELA to the Longshoremen's Act [emphasis added].

566 F.2d at 895.

This decision of the Fourth Circuit is directly applicable to Goode. The only difference between the Fourth Circuit decision in *Conti* and the present case, is that Goode was a railroad maintenance employee who was repairing the equipment used to brake the railroad cars prior to unloading rather than a brakeman actually participating in the unloading process and using the equipment.

Examination of the facts in the present case clearly reveals that Goode was not involved in an integral part of

the loading process. It is uncontroverted that the equipment he was required to repair was equipment designed to stop the movement of railroad cars. The retarder equipment was similar to equipment found throughout the railroad system, and was not unique to the loading of ships. There are trainmen who work in areas closer to the water than where Goode was while the cars are unloaded on the dumper. Further, the evidence is uncontradicted that Goode was one of several machinists who worked from a common seniority list, and performed varied tasks ranging from machinery repair, to railroad locomotive repair, to railroad car repair. Machinists are a craft that work throughout the railroad system. There are railroad hopper car unloading systems that use conveyor belts on which coal is unloaded at numerous sites located throughout the railroad system that have nothing to do with loading or unloading ships.

It is true that a line must be drawn somewhere, as clearly there are piers and ships are loaded at the Terminal. It is suggested that a logical point is the Belt Change House where the coal is transferred from one set of conveyor belts to the conveyor belts that take the coal directly to the ship. From this point on the machinery is clearly an integral part of the ship loading process.

To maintain, as the Railroad does, that all equipment on the east end of Lambert's Point Yard is an integral part of the loading process is illogical. Extended, this argument would include the coal mine worker who started delivery of the cars to the railroad, as would the engineer who runs the train, the brakemen who ride railroad cars on the hump yard at the east end of Lambert's Point, as well as the maintenance of way employees who lay the

track on which the railway cars roll on the way to the dumpers. Instead, the Court is urged to view the railroad cars as passing in a continuous cycle from the mines, to the dumpers, and back to the mines. That is indeed what actually transpires. Neither the cars, nor the machinery to stop the car, is involved in a ship loading process. This equipment brings the coal to the terminal. It follows that neither the men involved in car starting and stopping, railroad brakemen, nor workers who repair the machinery to stop the cars are an integral part of the ship loading process.

The Petitioner in this case is asking this Court to engage in an extension of LHWCA coverage which was clearly not the intent of Congress. It is asking this Court to designate a new and different kind of work as covered employment under the LHWCA.

This Court has recognized that there must be a boundary to coverage under the LHWCA. See *Herb's Welding*, 470 U.S. at 426-27. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 223-24 (1969). In *Herb's Welding*, *Caputo*, and *Pfeiffer*, this Court established that line. If a worker is performing traditional longshoring work and is involved in moving cargo between ship and land transportation, the worker will fall within LHWCA coverage. Conversely, if a worker is not performing traditional longshoring work or is not involved in moving cargo between ship and land transportation, the worker is not covered by the LHWCA. Goode, a railroad employee, was performing maintenance to equipment which is unique to railroad operations and found throughout the railroad system. The work Goode was performing is not traditional longshoring work but is traditional railroad work.

The equipment Goode was working on is used to brake railroad cars, it is not ship loading equipment. Goode was not involved in ship loading or unloading activities, but in traditional railroad activities; he is covered by FELA as opposed to LHWCA. The only factor which brings up the issue of LHWCA coverage is that Goode was performing maintenance to the railroad equipment at the Lambert's Point Terminal. LHWCA coverage is not an issue for the same class of railroad employee performing the same work at another Norfolk and Western facility. This single factor is not sufficient to take Goode out of the FELA scheme and place him under LHWCA. Robert Goode is not a maritime employee under the LHWCA.

III. CONGRESS INTENDED THAT THE FELA REMAIN THE EXCLUSIVE REMEDY FOR INJURED RAILROAD WORKERS.

Congress took possession of the field of federal employers' liability for injuries to employees involved in interstate transportation by rail when it enacted the FELA. The exclusivity aspect of this remedy was supported in the case of *Hosman v. So. Pacific Co.*, 83 P.2d 88, cert. denied, 306 U.S. 656 (1939). Like the LHWCA, the FELA is remedial in nature and should be construed so as to advance the remedy given by Congress and not to narrow it. See *Hoepfner v. Northern Pac. Rwy. Co.* 61 F. Supp. 819 (D.C. Mont. 1945).

The FELA has also been noted by Courts to be humanitarian in nature and should be liberally construed. In the opinion of *Johnson v. So. Pacific Co.*, 196 U.S. 1 (1904), this Court stated the following with regard to the predecessor to the present FELA:

The history of the Federal Employers' Liability Act and its remedial purpose impel to the conclusion that

it should be liberally construed as to the inclusion of its beneficiaries in order to effect its remedial purpose notwithstanding the fact that it is in derogation of the common law.

The liberal purpose of the FELA must be kept in mind when confronting arguments which would restrict an employers' liability under the Act. *See Baker v. Baltimore & Ohio Rwy. Co.*, 502 F.2d 638 (6th Cir. 1974). Clearly, the Congress and the authorities support the proposition that an injured railroad worker is entitled to a trial by jury on the issues of negligence and damages. To allow this Railroad to avoid a trial by jury by forcing its employees to accept Workmen's Compensation benefits would indeed be defeating the remedial purpose of the Act, which has been recognized by both the Courts and Congress.

CONCLUSION

For the above reasons, respondent Robert T. Goode, Jr. respectfully submits that the judgment of the Supreme Court of Virginia should be affirmed.

Respectfully Submitted,

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